

# Buffalo Law Review

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Volume 46  
Number 3 *Symposium on Law, Sovereignty and  
Tribal Governance: The Iroquois Confederacy*

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Article 11

10-1-1998

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Steven Paul McSloy  
*Cravath, Swaine & Moore*

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### Recommended Citation

Steven P. McSloy, *Border Wars: Haudenosaunee Lands and Federalism*, 46 Buff. L. Rev. 1041 (1998).  
Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol46/iss3/11>

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# ESSAY

## Border Wars: Haudenosaunee Lands and Federalism

STEVEN PAUL MCSLOY†

### I. HAUDENOSAUNEE INFLUENCE

When we consider the treatment of American Indians in the study of American constitutional law, we find that they are largely ignored. The leading constitutional treatise, Harvard Law Professor Laurence Tribe's *American Constitutional Law*,<sup>1</sup> deals with Indians largely in footnotes,<sup>2</sup> and the recent conference at Harvard Law School on the life and long career of Justice William Brennan did not

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† Associate, Cravath, Swaine & Moore. Formerly General Counsel, 1995-1998, Oneida Indian Nation; Assistant Professor of Law, 1991-1994, St. John's University School of Law; Adjunct Assistant Professor of Law, 1993-1995, N.Y.U. Law School; Adjunct Professor of Law, 1995-1998, Syracuse University College of Law; Adjunct Professor of Law, 1990, 1993-1995, Yeshiva University, Benjamin N. Cardozo School of Law. B.A., 1985, New York University; J.D., 1988, Harvard Law School.

This essay is based on a speech delivered at the *Buffalo Law Review* Symposium on Law, Sovereignty, and Tribal Governance: The Iroquois Confederacy, held March 20-21, 1998. The views expressed herein are the personal views of the author and do not represent in any way official positions of Cravath, Swaine & Moore or the Oneida Indian Nation.

I would like to thank the editors of the *Buffalo Law Review* for the invitation and their patience and Cravath, Swaine & Moore for their support.

1. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2d ed. 1988).

2. Of the nine references under the index heading "Indians," four are references to footnotes. *Id.* at 1766.

address the modern Supreme Court's numerous cases on Indians.<sup>3</sup> This is perhaps because of the scant regard the Supreme Court as a whole has often shown for Indian issues. Readers of *The Brethren*, Bob Woodward's inside look at the Supreme Court,<sup>4</sup> will remember that the Justices considered Indian cases to be "peewee" matters,<sup>5</sup> and Chief Justice Burger would punish junior Justices by making them write Indian law opinions.<sup>6</sup>

By contrast, Congress has explicitly recognized the influence of the Haudenosaunee<sup>7</sup> (Iroquois) Confederacy on the framing of the Constitution.<sup>8</sup> Haudenosaunee influence

3. See *Symposium Addresses*, 33 HARV. C.R.-C.L. L. REV. 313 (1998); CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 2 (1987) ("[T]he Court has become more active in Indian law than in fields such as securities, bankruptcy, pollution control, and international law.").

4. ROBERT WOODWARD, *THE BRETHREN* (1979).

5. *Id.* at 58 (describing how Justice Harlan considered one Indian matter before the Court "peewee" and insignificant). Justices also sometimes used an expletive to describe Indian cases. See *id.* at 359.

6. See *id.* at 412.

7. Pronounced "Ho-dee-no-so-nee." The term "Iroquois" is a French version of a pejorative name given to the Haudenosaunee by other indigenous peoples with whom they had warred. See FRANCIS JENNINGS, *THE AMBIGUOUS IROQUOIS EMPIRE* 25 (1984). The English and later the Americans referred to the Haudenosaunee in a political sense, calling them the "Six Nations" or "Six Nation Confederacy." See Treaty with the Six Nations, Nov. 11, 1794, 7 Stat. 44 (referring to the Haudenosaunee as "the Six Nations"); Elisabeth Tooker, *The League of the Iroquois: Its History, Politics, and Ritual*, in 15 HANDBOOK OF NORTH AMERICAN INDIANS 418 (Bruce G. Trigger et al. eds., 1978) [hereinafter HANDBOOK] (explaining that the Haudenosaunee constituent peoples are the Mohawk, the Oneida, the Onondaga, the Cayuga, the Seneca and the Tuscarora). On the Oneidas, see Ray Halbritter & Steven Paul McSloy, *Empowerment or Dependence? The Practical Value and Meaning of Native American Sovereignty*, 26 N.Y.U. J. INT'L. L. & POL. 531 (1994).

8. See S. Con. Res. 76, 100th Cong. 1st Sess., 133 CONG. REC. 12,214 (1987); see also Hearing on S. Con. Res. 76, S. Hrg. 100-610 (Dec. 21, 1987).

There has been a great deal of debate concerning the extent of the influence of the Haudenosaunee Confederacy on the American experience and on American forms of government. See Felix S. Cohen, *Americanizing the White Man*, 21 AM. SCHOLAR 177 (1952); JACK WEATHERFORD, *INDIAN GIVERS: HOW INDIANS OF THE AMERICAS TRANSFORMED THE WORLD* (1988); JACK WEATHERFORD, *NATIVE ROOTS: HOW THE INDIANS ENRICHED AMERICA* (1991). It is certainly true that the Framers, in trading and treating with the Haudenosaunee, became familiar with Haudenosaunee governance concepts and respected and admired the united diplomatic and military front presented by the Six Nations. Benjamin Franklin wrote in 1751:

It would be a very strange thing if Six Nations of Ignorant Savages could be capable of forming a Scheme for such an Union and be able to execute it in such a manner, as that it has subsisted Ages, and appears

can be seen on the face of the dollar bill as well, where one sees not only an eagle watching out over America as it watched out over the Haudenosaunee Great Tree of Peace, but also sees it clutching thirteen arrows, just as Seneca Sachem Canassatego did at the 1744 Treaty of Lancaster.<sup>9</sup> He showed colonial officials how a single arrow could be broken but that a bundle, whether it be the Six Nations of the Iroquois or the Thirteen Colonies, could not. Interestingly, the Haudenosaunee are also credited with influencing the Constitution's former opposite number, *The Communist Manifesto*.<sup>10</sup> Karl Marx's partner, Friedrich Engels, subtitled his own famous work, *Origins of the Family, Private Property and the State*, "in light of the researches of Lewis H. Morgan on the Iroquois."<sup>11</sup>

Beyond these claims of direct influence, however, lies a deeper connection between American Indians and the Constitution, for a major question in designing the Constitution was how to deal with Indians. This question had in fact preoccupied all the non-Indian governments of North America, from the British Crown to the Continental Congress to the Framers.

The basic issue was federalism, sometimes discussed as states' rights. Where did control lie? At the center or on the border? At the core, or on the periphery? In London or on

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indissoluble, and yet a like union should be impracticable for ten or a dozen English colonies.

Letter from Benjamin Franklin to James Parker (Mar. 20, 1751), in BRUCE E. JOHANSEN, *FORGOTTEN FOUNDERS: HOW THE AMERICAN INDIAN HELPED SHAPE DEMOCRACY* 66 (1982).

For various sides of the debate, see Gregory Schaaf, *From the Great Law of Peace to the Constitution of the United States: A Revision of America's Democratic Roots*, 14 AM. INDIAN L. REV. 323 (1989); Eric M. Jensen, *The Imaginary Connection Between the Great Law of Peace and the United States' Constitution: A Reply to Professor Schaaf*, 15 AM. INDIAN L. REV. 295 (1990); Robert Miller, *American Indian Influence on the United States Constitution and its Framers*, 18 AM. INDIAN L. REV. 133 (1993); Elisabeth Tooker, *The United States Constitution and the Iroquois League*, 35 ETHNOHISTORY 305 (1988).

9. See JOHANSEN, *supra* note 8, at 66. Colonial negotiators were to quote this advice back to the Haudenosaunee nearly 30 years later during the Revolution, when they were seeking the alliance of the Haudenosaunee against the British. *Id.* at 75-76.

10. KARL MARX & FRIEDRICH ENGELS, *THE COMMUNIST MANIFESTO* (D. Ryazanoff ed., Eden & Cedar Paul trans., Russell & Russell 1963) (1850). See Miller, *supra* note 8, at 141 n.59 (listing sources).

11. LEWIS HENRY MORGAN, *LEAGUE OF THE HO-DE'-NO-SAU-NEE OR IROQUOIS* (Herbert M. Lloyd ed., 1904) (1851).

the frontier? In Philadelphia, the U.S. federal capital, or Albany, the New York State capital? Who was in charge? This was a question for the Indians dealing with the Americans, but it was also a debate among the Americans dealing with the Indians.

It was not settled by any means until the Civil War, when the "Union" defeated the "Confederacy." Those two words encapsulate the ideological struggle embodied in America's bloodiest war. In the end, the centralists defeated the dispersionists; Washington, D.C., defeated the states; Hamilton defeated Jefferson. As the great historian James McPherson noted, before the Civil War, one said, "the United States *are* a republic." After the Civil War, one said, "the United States *is* a republic."<sup>12</sup>

But the great founding issue of federalism was not slavery. The Framers knew that they were not going to solve that problem, and the balance of power between Massachusetts and Virginia depended upon the North and the South coexisting peacefully, trading power back and forth. Until Andrew Jackson was elected President in 1828, thirty-eight years after Washington was first elected, every President was either a Virginia gentleman<sup>13</sup> or an Adams from Massachusetts.<sup>14</sup> The New Yorkers, of course, were generally too busy making money, building canals and stealing Indian land to bother with national politics until Martin Van Buren, the only Mayor of New York ever to become President, was elected in 1837.<sup>15</sup> Slavery was thus not disturbed by the Framers. It was expected by many and hoped by some that it would fade away, but the Constitution nonetheless protected it, though in careful, euphemistic states' rights terms: "The migration or importation of such persons as any of the states . . . shall think proper to admit, shall not be prohibited by Congress."<sup>16</sup>

The original story of federalism and states' rights was about dealing with Indians and, in large measure, specifically about dealing with the Haudenosaunee.

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12. JAMES MCPHERSON, *BATTLE CRY OF FREEDOM* 859 (1988).

13. See STEVEN G. O'BRIEN, *AMERICAN POLITICAL LEADERS FROM COLONIAL TIMES TO THE PRESENT* 214, 276, 292, 429 (1991)

14. See *id.*

15. See *id.* at 410.

16. U.S. CONST. Art. I, § 9, cl. 2.

## II. THE HAUDENOSAUNEE AND FEDERALISM

The Haudenosaunee had done a marvelous job for over a century of playing the French against the English prior to the (so-called) French and Indian War. This careful game of playing both ends against the middle is exactly why people today living North of the Iroquois speak French and people south of them speak English.<sup>17</sup>

After the defeat of France, however, the ability to play Quebec against the colonies was lost, but it was soon replaced by the brewing fight between London and America. Even after the Revolution, the Haudenosaunee would be forced into the middle of the competition between the colonies, flush with victory and eager to expand, and the new federal government, eager to establish itself on the world stage. Much of the fight was about the power to deal with Indians.

In 1763, King George laid down a Royal Proclamation forbidding land purchases from Indians without royal consent.<sup>18</sup> He also set a line down the Appalachians beyond which settlers were not supposed to go. Several of the colonies had similar laws regarding their own citizens,<sup>19</sup> but the 1763 Proclamation was the first imperial, federal level attempt at control. As might be expected, it was roundly ignored, even by such good men as George Washington, then a loyal British subject and officer in the British Army. Washington wrote in 1767, "notwithstanding the proclamation that restrains [claiming western land without im-

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17. As put by Peter Wilson, a Cayuga, to the New York Historical Society in 1847:

Glad were your fathers to sit down upon the threshold of the Long House [i.e., the Atlantic Seacoast]. Had our forefathers spurned you from it, when the French were thundering at the opposite side to get a passage through, and drive you into the sea, whatever has been the fate of other Indians, the Iroquois might still have been a nation, and I, instead of pleading here for the privilege of living within your borders, I might have had a country.

GREAT DOCUMENTS OF AMERICAN INDIAN HISTORY 159 (Wayne Moquin & Charles Van Doren eds., 1973). As stated by one author, if the Haudenosaunee had not allied with the British, "people in the United States might speak French today." STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 3 (2d ed. 1992).

18. See Robert N. Clinton, *The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict Over the Management of Indian Affairs*, 69 B.U. L. REV. 329 (1989).

19. See N.Y. CONST. of 1777, art. XXXVII (rendering invalid purchases of Indian land without the consent of the State Legislature).

perial approval] at present . . . any person . . . who neglects the present opportunity of hunting out good lands, and . . . marking and distinguishing them for his own . . . will never regain such a chance."<sup>20</sup>

Why did the British set down this line and ban purchases from Indians, invalidating deeds that did not have the King's approval? Did the King care for the Indians and desire to protect them from fraudulent transactions and rapacious settlers? The answer, of course, is "no." The King didn't want fraud and theft not because he thought it was wrong, but because he didn't want unhappy Indians. A nation of Indians which found itself dispossessed of its land or defrauded by liquor or by transactions made with false chiefs was liable to do what any reasonable person would do—get it back. Fraud and rapine would thus begin a cycle of violence which would often culminate in war. For the King, war was not a problem of morality but rather one of cost. The colonists were already making noise about taxes, and mercenary armies were expensive. To preserve the imperial fisc the King thus centralized control over the frontier. To be sure, there was a frontier, and it was going to advance, and Indian land was going to be purchased and non-Indians would be moving in, but all of this was to happen on London time, not colonial time. The line of settlement was not going to get out ahead of the ability of the army to defend it. If settlers went out and bought Indian land across the line, they were on their own.<sup>21</sup> In addition to the line down the Appalachians, the King also set a special line with the Haudenosaunee, the famous Line of Property laid down at the 1768 Treaty of Fort Stanwix.<sup>22</sup>

The colonists were none too happy about this. In their view, the land was just sitting here. All one had to do was get the Indians out of the way, and Indian resistance to white settlement was seen as the unjustifiable response of infidel savages to the march of civilization. The Declaration of Independence listed as one of its grievances against the King that he would not do enough to protect the colonies and their settlers from the Indians: "He . . . has endeavored to bring on the inhabitants of our frontiers, the merciless

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20. 2 THE WRITINGS OF GEORGE WASHINGTON 218-24 (W. Ford ed., 1889).

21. See *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 594 (1823).

22. See WILLIAM N. FENTON, *THE GREAT LAW AND THE LONGHOUSE: A POLITICAL HISTORY OF THE IROQUOIS CONFEDERACY* 538-39 (1998).

Indian savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions."<sup>23</sup>

The Articles of Confederation tried to have it both ways on the subject of Indians by giving power both to the Continental Congress and reserving it to the states. Article IX § 4 of the Articles stated that "The United States in Congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, . . . provided that the legislative right of any State within its own limits be not infringed or violated."<sup>24</sup> No less a person than James Madison wrote in the *Federalist Papers* that Article Nine was "obscure and contradictory" and "absolutely incomprehensible."<sup>25</sup>

The crucial question for the colonies during the Revolution was, which way would the Haudenosaunee go? Would they back the British or side with the colonists? This was a great debate among the Haudenosaunee as well, and it almost split the Confederacy. In the end, the central fire at Onondaga was covered, and each nation chose its own path.<sup>26</sup> The Oneidas, along with the Tuscaroras who were

23. THE DECLARATION OF INDEPENDENCE para. 28 (U.S. 1776).

24. ARTICLES OF CONFEDERATION art. IX, § 4 (1777).

25. THE FEDERALIST NO. 42, at 306 (James Madison) (B. Wright ed., 1961); see *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 558. The federal courts have held that the confederal government did not have the power under the Articles of Confederation to prevent New York from concluding Indian treaties. See *Oneida Indian Nation of N.Y. v. New York*, 860 F.2d 1145, 1157 (2d Cir. 1988) (explaining that under the Articles of Confederation, a state was free to purchase Indian land within its borders, as long as such purchase did not infringe on the power of Congress to make war and peace), *cert. denied*, 493 U.S. 871 (1989).

26. According to nineteenth century scholar Lewis Henry Morgan:

At the beginning of the American Revolution, the Iroquois could not agree in council to make war as a confederacy upon our confederacy [the colonies]. A number of Oneida sachems [chiefs] firmly resisted the assumption of hostilities, and thus defeated the measure as an act of the League [Confederacy], for the want of unanimity. Some of the nations, however, especially the Mohawks [under the leadership of the notorious Joseph Brant], were so interlinked with the British, that neutrality was impossible. Under this pressure of circumstances, it was resolved in council to suspend the rule, and leave each nation to engage in the war upon its own responsibility.

MORGAN, *supra* note 11, at 108. According to Elisabeth Tooker, the Haudenosaunee "covered the Council Fire of the League in 1777, leaving each tribe to pursue its own course of action during the war." Elisabeth Tooker, *The League of the Iroquois: Its History, Politics, and Ritual*, in HANDBOOK, *supra* note 7, at 435.



under their supervision, sided with the colonists,<sup>27</sup> while the other nations, under the leadership of Joseph Brant,<sup>28</sup> whose sister<sup>29</sup> was married to the King's Indian Agent, Sir William Johnson,<sup>30</sup> sided with the British. Part of the later punishment for having supported the British was that Onondaga, Cayuga and Seneca lands in New York and the west were held forfeit at the end of the war.<sup>31</sup> Brant's English patrons made no provision for their Indian allies in the peace treaty with the colonies<sup>32</sup> and only offered them land in Canada.<sup>33</sup> New York took land from the defeated nations and created the Military Tract,<sup>34</sup> lands which were given to veterans in lieu of back pay. The towns of the Military Tract were named after Greek and Roman generals and poets, names which still exist in the towns

27. As written in 1778 by James Duane, a federal treaty agent, to Governor George Clinton of New York, regarding a meeting with the Oneida Nation:

An Oneida Chief answered for that Nation and the Tuscarorers [sic] with a Spirit and Dignity which would not have disgraced a Roman Senator. He . . . declared the *unalterable* Resolution of the Oneidas & Tuscarorers [sic], at every hazard, to hold fast the Covenant Chain with the United States, and with them to be buried in the same Grave; or to enjoy the *Fruites* [sic] of Victory and Peace. . . . He concluded with a solemn assurance that these two nations would at all Times be ready to cooperate with Us against all our Enemies.

Letter from James Duane to Governor George Clinton (March 13, 1778) reprinted in 4 THE ONEIDA INDIAN NATION, Mar. 1993, at 3 (Official publication of the Oneida Nation of New York). After the Revolution, the United States entered into a unique treaty thanking the Oneidas for their alliance. See Treaty Between the United States and the Oneida, Tuscarora, and Stockbridge Indians, Dwelling in the Country of the Oneidas, Dec. 2, 1794, 7 Stat. 47.

28. See BARBARA GRAYMONT, THE IROQUOIS IN THE AMERICAN REVOLUTION 53 (1972) (describing Joseph Brant and his ties to the British).

29. See *id.* at 29 (noting domestic relationship of Mary Brant and Sir William Johnson).

30. See *id.* at 29-30 (relating the facts of Sir William Johnson's life among the Iroquois).

31. To the other Haudenosaunee nations which had allied with the British, the victorious United States "dictated a series of harsh terms. As for the Oneidas, they were treated as allies, their right to undisturbed use of their land guaranteed." Jack Campisi, *The Oneida Treaty Period*, in THE ONEIDA INDIAN EXPERIENCE; TWO PERSPECTIVES 48 (Jack Campisi & Laurence M. Hauptman eds., 1988). See also REGINALD HORSMAN, EXPANSION AND AMERICAN INDIAN POLICY, 1783-1812, at 19-20 (1967).

32. Treaty of Paris, Oct. 3, 1783, 8 Stat. 80.

33. See FENTON, *supra* note 22, at 601-02.

34. See HELEN M. UPTON, THE EVERETT REPORT IN HISTORICAL PERSPECTIVE: THE INDIANS OF NEW YORK 26-27 (1980) (reproducing the boundaries of the Military Tract).

around Syracuse, New York: Cicero, Pompey, Tully, Fabius, Lysander, Camillus, Manlius, Homer, Hannibal and others.

After the Revolution, in 1783, the Continental Congress enacted its own Proclamation,<sup>35</sup> forbidding purchases of Indian land without congressional assent.<sup>36</sup> Like its royal predecessor, it was roundly ignored by the states.

The end of the Revolution was not, however, the end of the British problem, as the British kept their forts in Seneca country<sup>37</sup> and tried to get the Six Nations to make war on New York and the other colonies.<sup>38</sup> The British problem would not be resolved until after the War of 1812, when the boundary of Canada was set. The federal government, therefore, needed the alliance of the Haudenosaunee both to protect the colonies and to allow for American expansion westward into the Ohio valley. Thus came the 1784 Treaty at Fort Stanwix,<sup>39</sup> in which peace was given to the Six Nations. This separate peace was necessitated by the fact that the Treaty of Paris between England and America made no mention of the Six Nations. The Fort Stanwix Treaty also offered special recognition to and protection for the lands of the Oneidas due to their wartime alliance with the Colonists.<sup>40</sup>

This was the federal side of the story: the need to make national peace, to secure the opening of the Ohio Valley and to keep the British in their forts at Niagara and elsewhere. The state side of the story (New York, that is) was the same as it had ever been—land. Revolutionary War soldiers from New England who had served in New York State had seen its good farmland, unlike the rocky fields of Massachusetts,

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35. *A Proclamation*, 25 JOURNAL OF THE CONTINENTAL CONGRESS 602 (1783).

36. *See id.* (prohibiting "all persons from making settlements on lands inhabited or claimed by Indians, without the limits or jurisdiction of any particular state, and from purchasing or receiving any gift or cessation of such lands or claims without the express authority and directions [of Congress]").

37. *See* FENTON, *supra* note 22, at 605 (describing the amicable relations of the British at Fort Niagara and the Haudenosaunee). *See also* HENRY S. MANLEY, *THE TREATY OF FORT STANWIX, 1784*, at 22 (1932) (discussing the British forts at Niagara and Oswego).

38. *See* FENTON, *supra* note 22, at 662 (describing British attempts to incite the Six Nations to war with the new United States).

39. Treaty With the Six Nations at Fort Stanwix, Oct. 22, 1784, 7 Stat. 15. [hereinafter Treaty of Fort Stanwix]. *See generally* MANLEY, *supra* note 37.

40. "The Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled." Treaty of Fort Stanwix, *supra* note 39, art. II.

and enterprising men had already begun making plans for a canal along what was called the "water level route," the flat land of the Haudenosaunee south of the lakes and north of the mountains. This was the opening to the West that had been used since Dutch times.

If one looked at the eastern part of North America from the air, one would see what is no longer recognizable when driving west by car: the mighty barrier of the Appalachians, stretching from Albany, New York to Atlanta, Georgia. In colonial times, there was no path across the mountains until Daniel Boone blazed the Cumberland Trail into Tennessee in 1776. To get west, one had to follow the water level route. Starting at Manhattan, one of the greatest natural harbors in the world, a voyager sailed up the Hudson to Albany and turned west down the Mohawk all the way to Fort Stanwix,<sup>41</sup> which guarded the Oneida Carry.<sup>42</sup> This portage between present day Rome and the Wood Creek inlet into Oneida Lake, near present day Sylvan Beach, was a critical juncture and thus was guarded, not only by Fort Stanwix, but by other forts as well.<sup>43</sup> Similarly, forts at Ticonderoga and Crown Point and Forts William Henry, Edward, Anne and Mount Hope all guarded similar portages between Lake Champlain, Lake George and the head of the Hudson,<sup>44</sup> which was the North-South water route to Canada and Montreal. The water level route was the way west. At Fort Stanwix, having arrived at the Oneidas' door, one then proceeded west through Haudenosaunee territory (with their permission, of course) to Seneca country, out the western door and into the Ohio Valley. Amtrak still calls its train from New York City to Buffalo the "Water Level Route," and the New York State Thruway, Interstate 90, follows the same path all the way to Seattle.

New York was thus the key to a continent, earning the

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41. See FENTON, *supra* note 22, at 608-09 (recounting the individual journeys of James Madison and James Monroe along the water level route through the Mohawk valley, with a stop at Fort Stanwix, on the site of present-day Rome, New York).

42. See *id.* at 607-08 (describing the 1783 journey of George Washington across the Wood Creek portage).

43. Other forts guarding Oneida Lake included Fort Brewerton, on the lake's north side. See GRAYMONT, *supra* note 28, at 1.

44. See FENTON, *supra* note 22, at 607 (describing the water route from Manhattan to Montreal).

name "Empire State." The American Empire started in New York. Many commercial men recognized New York's potential and knew that, to achieve it, they needed to move the Haudenosaunee out of the way. This was done in part by the punishing imposition of the Military Tract. The Mohawks were already largely out of the way, having been driven from the valley that carries their name<sup>45</sup> and either settling at Akwesasne<sup>46</sup> or fleeing to Canada with Brant. The Oneidas, however, had a great Reservation between Oneida Lake in the north and the mountains in the south. In a sense, they were the cork in the bottle.

This is where federalism came in. New York considered the Haudenosaunee to be "its" Indians, and, the Constitution notwithstanding, New York started to deal for Indian land. The federal government officially disapproved, and the conduct was illegal, but New York moved fast.<sup>47</sup> In 1785, it bought a large parcel of land from the Oneidas in the south between the Unadilla and the Susquehanna.<sup>48</sup> In 1786, the Convention at Hartford settled the dispute between Massachusetts and New York over Seneca lands.<sup>49</sup> Both states claimed the lands under royal charters, Massachusetts' charter going straight east from Boston and the Duke of York's charter going off at an angle from Manhattan until they intersected in Seneca land. The 1786 compromise was just that: New York would get jurisdiction over the land but Massachusetts would get the proceeds from any sales.<sup>50</sup> The subsequent Phelps and Gorham Purchase of 1786<sup>51</sup> began a series of contracts for Seneca land, later contestants for which included Robert Morris

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45. See *id.* at 601 (discussing Mohawk removal and flight to Canada).

46. See *id.* at 452 (noting Mohawk settlement at Akwesasne).

47. The many New York State "treaties" are set forth in REPORT OF THE SPECIAL COMMITTEE TO INVESTIGATE THE INDIAN PROBLEM OF THE STATE OF NEW YORK, APPOINTED BY THE ASSEMBLY OF 1888 (1889) [hereinafter WHIPPLE REPORT]. See UPTON, *supra* note 34, at 17-49 (recounting the various land agreements New York State entered into with the Haudenosaunee).

48. See Treaty with the Oneidas and Tuscaroras, June 8, 1785, in WHIPPLE REPORT, *supra* note 47, at 234 [hereinafter 1785 Treaty of Fort Herkimer]; Oneida Indian Nation of N.Y. v. New York, 860 F.2d 1145, 1148-49 (2d Cir. 1988), *cert. denied*, 493 U.S. 871 (1989).

49. See WHIPPLE REPORT, *supra* note 47, at 105.

50. See *id.*

51. See WHIPPLE REPORT, *supra* note 47, at 16-24 (discussing Phelps, Gorham and Ogden purchases of Seneca land).

and the Holland Land Company,<sup>52</sup> making a con-fusing mess of things for nearly fifty years.<sup>53</sup>

The year 1788 was even more important for the State of New York, as it robbed the Oneidas of over six million acres<sup>54</sup> and the Onondagas of at least as much in two treaties at Fort Stanwix.<sup>55</sup> In the treaties, a Reservation (in the Oneidas' case, over four hundred square miles) was retained by each Nation.

The federal government reasserted itself in 1789 with the adoption and ratification of the Constitution. The Commerce Clause, along with the Treaty power, made clear that the federal government held supremacy over the Indian affairs.<sup>56</sup> In Chief Justice John Marshall's words, "[t]he shackles imposed on this power, in the confederation, are discarded."<sup>57</sup>

The federal government also completed the Treaty of Fort Harmar in 1789,<sup>58</sup> wherein it used the same words as the 1784 Fort Stanwix Treaty<sup>59</sup> to give peace to the Six Nations and, more specifically, to protect the land of the Oneidas. All of this activity, however, did not stop New York from concluding a treaty with the Cayugas in 1789<sup>60</sup>

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52. *See id.*

53. *See* Laurence M. Hauptman, *Seneca Nation of Indians v. Christy: A Background Study*, 46 BUFF. L. REV. 929 (1998).

54. *See* Treaty with the Oneida Indians, Sept. 22, 1788, in WHIPPLE REPORT, *supra* note 47, at 237.

55. *See* Treaty with the Onondagas, Sept. 12, 1788, in WHIPPLE REPORT, *supra* note 47, at 190.

56. U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power to regulate commerce with Indian tribes); *id.*, art. II, § 2, cl. 2 (giving the President the power to conclude treaties).

57. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

58. Treaty with the Six Nations at Fort Harmar, Jan. 9, 1789, 7 Stat. 33, 34 [hereinafter Treaty of Fort Harmar] (describing how Oneidas were "again secured and confirmed in the possession of their . . . lands").

59. Treaty With the Six Nations at Fort Stanwix, Oct. 22, 1784, 7 Stat. 15. [hereinafter Treaty of Fort Stanwix].

60. Treaty with the Cayugas, Feb. 25, 1789, in WHIPPLE REPORT, *supra* note 47, at 216. *See also* Treaty with the Cayugas, Nov. 5, 1791, in WHIPPLE REPORT, *supra* note 47, at 220. The Cayuga treaties have engendered much litigation between the Cayuga Nation and the State of New York resulting in several reported judicial opinions. *See, e.g.,* Cayuga Indian Nation v. Carey, 89 F.R.D. 627 (N.D.N.Y. 1981); Cayuga Indian Nation of N.Y. v. Fox, 544 F. Supp. 542 (1982); Cayuga Indian Nation of N.Y. v. Cuomo, 565 F. Supp. 1297 (1983); Cayuga Indian Nation of N.Y. v. Cuomo, 667 F. Supp. 938 (1987); Cayuga Indian Nation of N.Y. v. Cuomo, 730 F. Supp. 485 (1990); Cayuga Indian Nation of N.Y. v. Cuomo, 758 F. Supp. 107 (1991); Cayuga Indian Nation of N.Y. v.

which was almost identical to the 1788 Oneida and Onondaga treaties, taking millions of acres and leaving a defined reservation of only 64,000 acres.

The very first Congress in 1790, emboldened by the Constitution's clear delegation of Indian affairs to Congress, passed the Non-Intercourse Act,<sup>61</sup> which is the basis of all Haudenosaunee land claims.<sup>62</sup> In substance, it was not different from the King's 1763 Proclamation<sup>63</sup> or the Continental Congress' 1783 Proclamation,<sup>64</sup> forbidding purchases of Indian land by individuals or states without federal consent. President Washington, in responding to Seneca Chief Cornplanter, said that "the General Government only has the power to treat with the Indian nations [respecting the sale of their lands], and any treaty formed and held without its authority will not be binding."<sup>65</sup> He also assured the Senecas that the federal courts would be open to them for redress of grievances.<sup>66</sup> Now a national leader, Washington felt the need, as had the King before him, to prevent expensive wars, and he was the main force pushing Congress to pass the Non-Intercourse Act.<sup>67</sup>

Yet for all the clarity of the Constitution and the will of Washington, states' rights continued on the march. In 1791, New York State sold millions of acres of Adirondack land to Alexander Macomb, a fur trader, over Mohawk objections.<sup>68</sup> In 1792, the federal government stepped back in, with Washington signing an annuity agreement in that year for

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Cuomo, 762 F. Supp. 30 (1991); *Cayuga Indian Nation of N.Y. v. Cuomo*, 771 F. Supp. 19 (1991).

61. Trade and Intercourse Act, ch. 33, 1 Stat. 137 (1790) (current version at 25 U.S.C. § 177 (1994)) (forbidding state or individual purchases of Indian lands without federal consent).

62. See Clinton & Hotopp, *supra* note 20, at 19-49 (discussing the imperial, confederal and early republican attempts to restrain the colonial and state enthusiasm for acquiring Indian land); John E. Barry, *Oneida Indian Nation v. County of Oneida: Tribal Rights of Action and the Indian Trade and Intercourse Act*, 84 COLUM. L. REV. 1852 (1984).

63. See Clinton, *supra* note 18.

64. See *Proclamation*, *supra* note 35.

65. *Oneida Nation v. New York*, 649 F. Supp. 420, 436 (N.D.N.Y. 1986) (quoting Reply of the President of the United States to the Speech of the Cornplanter from December 29, 1790).

66. See FENTON, *supra* note 22, at 634.

67. See *id.*

68. See UPTON, *supra* note 34, at 40 (describing the land purchase of Macomb and the Mohawk attempts to prevent the transfer).

the Iroquois of \$1500 year,<sup>69</sup> an amount later incorporated in the 1794 Treaty of Canandaigua.<sup>70</sup>

In 1793, however, the Onondagas lost three quarters of their reservation to the state.<sup>71</sup> This was the first illegal "treaty" for the Onondagas in violation of the Non-Inter-course Act and became the basis for their as yet unfilled land claim.<sup>72</sup>

Continued British interference in the Ohio Valley<sup>73</sup> and America's Indian wars<sup>74</sup> tore at the Senecas and other Iroquois nations, and the United States fought to keep them as allies. The result was the 1794 federal Treaty of Canandaigua, the strongest and most equal of all Indian treaties.<sup>75</sup> In it, the United States recognized the lands of the Haudenosaunee and then stated that all the reservations, the Oneida, the Onondaga, the Cayuga and the Seneca, would never be claimed by the United States.<sup>76</sup> This had the

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69. Agreement with the Five Nations of Indians, 1792, 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS 232, reprinted in II Indian Affairs: Law and Treaties 1027.

70. Treaty With the Six Nations at Canandaigua, Nov. 11, 1794, 7 Stat. 44. [hereinafter Treaty of Canandaigua].

71. Treaty with the Onondagas, Nov. 18, 1793, in WHIPPLE REPORT, *supra* note 47, at 195.

72. The Onondaga case is interesting because it has never been filed and it is the biggest of them all, taking in the whole city of Syracuse. See Indian Law Resource Center, 1992, 1993, 1994, 1995 and 1996 Annual Reports (Helena, Montana); Brian Carr, *Onondagas to File Claim for Lost Land*, SYRACUSE HERALD-J., June 29, 1994, at A1; see also *Onondagas, Pataki Meet About Land Claim*, POST-STANDARD (Syracuse), Feb. 26, 1998, at B1. Tim Coulter and Joe Heath, two lawyers claiming to represent the Onondaga people, had a meeting with Governor Pataki's staff about the claim, but it remains unfilled. There was an attempt by some members of the Onondaga Nation to file suit, see *Onondaga Nation v. New York*, No. 97-CV-445, 1997 WL 369389 (N.D.N.Y. June 25, 1997), but it was opposed by Coulter and Heath on the basis that the plaintiffs weren't authorized to bring the claim. The plaintiffs then withdrew the suit when the leaders at Onondaga would not back it, rather than risk any adverse rulings in the case.

73. See FENTON, *supra* note 22, at 637-40 (describing the military conflicts in the Ohio valley between American forces and Indians friendly to the British).

74. *Id.*

75. See Treaty with Canandaigua, *supra* note 70. See generally FENTON, *supra* note 22, at 641-61 (describing the concerns of each of the parties to the Treaty of Canandaigua in the months leading up to the signing). An excellent study of the federal treaties with the Haudenosaunee up to and including the Treaty of Canandaigua is Bianca Wulff, *Redundancy or Resistance? The Stanwix, Harmar and Canandaigua Treaties, 1784-1794* (1997) (unpublished paper on file with the *Buffalo Law Review*).

76. See Treaty of Canandaigua, *supra* note 70, at 45 (assuring that "[t]he

effect of turning the 1788 Oneida and Onondaga state reservations and the 1789 Cayuga state reservation into federally recognized Indian reservations. The same was done with the Seneca lands. On the way home from Canandaigua, Timothy Pickering, the United States Treaty Commissioner, stopped at Oneida to conclude a treaty especially thanking the Oneidas for their honorable service in the Revolution.<sup>77</sup>

One would think that New York State might hesitate before breaking these important federal treaties, but it barely paused. In 1795, the state concluded the first illegal "treaty" with the Oneidas, taking over 100,000 acres of land.<sup>78</sup> This was the treaty that the Oneidas took to the Supreme Court and invalidated on the simple and straight forward theory that it violated the Non-Intercourse Act.<sup>79</sup> Also in 1795, the state took the salt lake (Onondaga Lake today) away from the Onondagas, leaving them an annual ration of salt,<sup>80</sup> and completely wiped out the Cayuga

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United States acknowledge the lands reserved to the Oneida . . . Nation . . . and called [its] reservations, to be [Indian] property, and the United States will never claim [them], nor disturb . . . the free use and enjoyment thereof[.]").

77. See Treaty Between the United States and the Oneida, Tuscarora, and Stockbridge Indians, Dwelling in the Country of the Oneidas, Dec. 2, 1794, 7 Stat. 47, 48 (noting that "in the late war, . . . the Oneida . . . adhered faithfully to the United States, [and] the United States . . . acknowledged their obligations to these faithful friends, and promised to reward them.").

78. Treaty with the Oneidas, Sept. 15, 1795, in WHIPPLE REPORT, *supra* note 47, at 244.

79. For the several reported cases involving the Oneida Nation's land claims, see *County of Oneida v. Oneida Indian Nation of N.Y.*, 414 U.S. 661 (1974); 470 U.S. 226 (1985) (upholding claims arising from post-1790 treaties); *United States v. Boylan*, 256 F. 468 (N.D.N.Y. 1919), *aff'd*, 265 F. 165 (2d Cir. 1920), *appeal dismissed*, 257 U.S. 641 (1921). See also *Boylan v. George*, 117 N.Y.S. 573 (N.Y. App. Div. 1909); *Oneida Indian Nation of N.Y. v. New York*, 860 F.2d 1145 (2d Cir. 1988) (denying claims arising from pre-1790 claims), *cert. denied*, 493 U.S. 871 (1989).

Oneida claims have also resulted in many reported decisions of the Indian Claims Commission, including: *Oneida Indian Nation of N.Y. v. United States*, 20 Ind. Cl. Comm'n 337 (1969); 26 Ind. Cl. Comm'n 583 (1971); 37 Ind. Cl. Comm'n 522 (1976), *aff'd*, 576 F.2d 870 (Ct. Cl. 1978) (addressing pre-1790 claims); 26 Ind. Cl. Comm'n 138 (1971), *aff'd in part, remanded in part*, 477 F.2d 939 (Ct. Cl. 1973), *on remand*, 43 Ind. Cl. Comm'n 373 (1978) (addressing post-1790 claims).

Much has been written about the Oneida Nation's claims. See, e.g., GEORGE C. SHATTUCK, *THE ONEIDA LAND CLAIMS: A LEGAL HISTORY* (1991); John Tahsuda, *The Oneida Land Claim: Yesterday and Today*, 46 BUFF. L. REV. 1001 (1998).

80. See Treaty with the Onondagas, July 28, 1795 in WHIPPLE REPORT,



Reservation.<sup>81</sup>

In 1796, the Mohawk question was dealt with by the federal government, which confirmed the Akwesasne reservation in an agreement styled, "Treaty with the Seven Nations of Canada."<sup>82</sup> The following year, it approved a relinquishment by Joseph Brant and the Canadian Mohawks of all their New York lands.<sup>83</sup> At the Western Door, Robert Morris appeared,<sup>84</sup> and he closed a contract with the Senecas relating to the Massachusetts claim previously purchased by Phelps and Gorham.<sup>85</sup> Dutch traders from the Holland Land Company were also involved, continuing a tangled history of land deals in Seneca country.<sup>86</sup>

With the Treaty of Canandaigua preventing the Haudenosaunee from allying with the British or the Western Indians, and with the treaties with the Mohawks resolving their issues on the Canadian border, the federal government's attention began to shift to the West. Again New York wasted no time, as it wanted to build its canal and take advantage of western trade. The key was to get the Oneidas out of the way, their faithful service in the Revolution notwithstanding. Between 1795 and 1846, the state concluded over twenty seven illegal treaties with the Oneidas,<sup>87</sup> splitting the nation again and again until they were systematically ground down to thirty two acres.<sup>88</sup> The Erie Canal and, later, the New York State Thruway were flung across their ancient lands.

The Mohawks at Akwesasne came under state pressure as well, and between 1816 and 1845 various pieces of that Reservation were illegally taken.<sup>89</sup> In 1817, the Onondagas

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*supra* note 47, at 199.

81. See Treaty with the Cayugas, July 27, 1795, in WHIPPLE REPORT, *supra* note 47, at 224.

82. Treaty with the Seven Nations of Canada, May 31, 1796, 7 Stat. 55.

83. Relinquishment to New York By the Mohawk Nation of Indians of All Claim to Lands in That State, 7 Stat. 61 (1797).

84. See WHIPPLE REPORT, *supra* note 47, at 18-20 (discussing Morris purchase of Seneca land).

85. See *id.*

86. See Hauptman, *supra* note 53 (discussing Seneca land deals).

87. See WHIPPLE REPORT, *supra* note 47, at 234-365 (discussing Oneida "treaties" with New York State).

88. U.S. v. Boylan, 265 F. 165 (2d Cir. 1920) *appeal dismissed*, 257 U.S. 641 (1921) (describing the diminution of the Oneida land holdings).

89. See WHIPPLE REPORT, *supra* note 47, at 369-80 (reproducing the state "treaties" by which New York State acquired Mohawk lands). Mohawk lands

lost 4320 acres along with the so-called "Webster tract."<sup>90</sup> In 1822, they lost another 800 acres on the south side of their Reservation,<sup>91</sup> and in 1829 all their prior treaty monies were wrapped up in the annual "June money" distribution,<sup>92</sup> along with the salt the Onondagas received annually for having sold the salt lake. The state still faithfully sends the June money and the salt every year, a gesture symbolizing that it still considered the transactions valid. The Cayugas also had their prior annuities wrapped up in 1829.<sup>93</sup>

The Senecas in the West underwent a long and confusing history of dispossession, sometimes by the state, sometimes by the federal government.<sup>94</sup> The federal Buffalo Creek Treaty in 1838 was aimed at getting rid of the Senecas entirely,<sup>95</sup> but it was countermanded in part at Quaker insistence by an 1842 treaty<sup>96</sup> confirming the Allegany and Cattaraugus reservations.<sup>97</sup> In 1856, a court case confirmed the Oil Springs reservation as well,<sup>98</sup> based on the testimony of the aged Governor Blacksnake, a

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were flooded and destroyed by the construction of the Saint Lawrence Seaway. See also LAURENCE M. HAUPTMAN, *THE IROQUOIS STRUGGLE FOR SURVIVAL: WORLD WAR II TO RED POWER* 105-22, 151-78 (1986); *Thompson v. Franklin County*, 180 F.R.D. 216 (N.D.N.Y. 1998).

90. See Treaty with the Onondagas, Feb. 25, 1817, in WHIPPLE REPORT, *supra* note 47, at 204.

91. See Treaty with the Onondagas, Feb. 11, 1822, in WHIPPLE REPORT, *supra* note 47, at 206.

92. See Treaty with the Onondagas, Feb. 28, 1829, in WHIPPLE REPORT, *supra* note 47, at 208.

93. See Treaty with the Cayugas, Feb. 8, 1829, in WHIPPLE REPORT, *supra* note 47, at 230.

94. The Senecas have fought several land claim fights over the flooding of their land by the Kinzua Dam. See *Seneca Nation of Indians v. Brucker*, 262 F.2d 27 (D.C. Cir. 1958); *Seneca Nation of Indians v. United States*, 338 F.2d 55 (2d Cir. 1964). The Tonawanda Band of Indians and the Seneca Nation of Indians of the Allegany and Cattaraugus Reservations have filed land claims against New York State concerning Grand Island and other lands. See *Seneca Nation Files Suit to Reclaim Grand Island*, N.Y. TIMES, Aug. 26, 1993, at B5; *Grand Island Residents Hope To Keep Homes In Seneca Land Claim*, POST-STANDARD (Syracuse), May 23, 1994, at B1; *Senecas Pleased With Decision In Federal Court*, BUFF. NEWS, Aug. 15, 1998, at C5. See also Hauptman, *supra* note 53.

95. Treaty With the New York Indians, Jan. 15, 1838, 7 Stat. 550 [hereinafter 1838 Buffalo Creek Treaty].

96. Treaty With the Senecas, May 20, 1842, 7 Stat. 586 [hereinafter 1842 Buffalo Creek Treaty].

97. *Id.* at 589.

98. See WHIPPLE REPORT, *supra* note 47, at 20-21 (discussing Oil Springs case).

Seneca chief who lived to be 117 years old, and who testified that he was with Cornplanter when he met Washington in 1790 and that he personally had shaken George Washington's hand five times.<sup>99</sup> The Tonawanda reservation was supposed to have been sold in 1842,<sup>100</sup> but the Senecas there refused to leave, and in 1857, a federal treaty recognized their right to stay.<sup>101</sup> The Tuscaroras, who had initially settled with the Oneidas,<sup>102</sup> received a deed from the Senecas in 1808 to stay on their lands<sup>103</sup> (at least until Robert Moses flooded them out in the 1950s<sup>104</sup>). Out West, most of the Oneidas who sold their homeland and moved to Wisconsin received federal recognition as a tribe in 1838. They also received their own reservation.<sup>105</sup> Other Oneidas went to Canada.<sup>106</sup>

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99. See *id.* at 21 (discussing Blacksnake, his unusual longevity and remarkable personal history).

100. Treaty With the Seneca Indians, Nov. 5, 1857, 11 Stat. 735 [hereinafter Treaty With the Tonawanda Band of Senecas]

101. *Id.* at 736.

102. See David Landy, *Tuscarora Among the Iroquois*, in HANDBOOK, *supra* note 7, at 518, 519-20 (describing initial settlements of Tuscaroras close to the Oneida lands).

103. See WHIPPLE REPORT, *supra* note 47, at 401.

104. See Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960) (permitting the New York State Power Authority to acquire certain Tuscarora lands adjacent to the Niagara River for use as a reservoir in order to facilitate the generation of hydroelectric power); see also ROBERT CARO, THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK 825-26 (1974) (describing the opening of the Robert Moses Power Dam on the Niagara River in 1961); HAUPTMAN, *supra* note 89, at 151-78. The Tuscarora case prompted an outraged dissent by Justice Black, who stated (in reference to United States treaty promises to the Haudenosaunee) that "great nations, like great men, should keep their word." *Tuscarora*, 362 U.S. at 142 (Black, J. dissenting).

105. Treaty With The Oneidas, 7 Stat. 566 (1838). On the sale of land by certain Oneidas and their movement westward, see Jack Campisi, *Oneida*, in HANDBOOK, *supra* note 7, at 485-87; LAURENCE M. HAUPTMAN, THE IROQUOIS AND THE NEW DEAL 70-71 (1981); Robert Venables, *Victim Versus Victim: The Irony of the New York Indians' Removal to Wisconsin*, in AMERICAN INDIAN ENVIRONMENTS: ECOLOGICAL ISSUES IN NATIVE AMERICAN HISTORY (Christopher Vecsey & Robert W. Venables eds., 1980).

106. The Oneidas who emigrated to the Thames River in Ontario, Canada, in the early 1800s are today known as the "Oneida of the Thames Band." See Robert J. Surtees, *The Iroquois in Canada*, in THE HISTORY AND CULTURE OF IROQUOIS DIPLOMACY: AN INTERDISCIPLINARY GUIDE TO THE TREATIES OF THE SIX NATIONS AND THEIR LEAGUE 67, 79 (Francis Jennings et al. eds., 1985); Jack Campisi, *Oneida*, in HANDBOOK, *supra* note 7, at 481, 487-89.

## III. BORDER WARS

It is always about borders and land: borders between Indian people and non-Indians, borders between European empires, and borders between the colonies and later the states. It is also about what one might call legal borders, and in particular, the border between the powers of the states and the power of the federal government. This border has shifted over the years. A civil war, the bloodiest in American history, was fought on this legal border. The New Deal was another border shift—a bloodless one, but based on the greatest economic crisis ever faced by the United States. States' rights recently returned with a vengeance in the Gingrich Revolution and the Contract with America.<sup>107</sup>

Federalism is a mighty, enduring and shifting power, and Indian people have been caught on both sides of the line. At first glance, one might think that the landmark Oneida land claims case had something to do with Indians;<sup>108</sup> that would be wrong. One might also think that the Supreme Court's decision in *Seminole Tribe v. Florida*<sup>109</sup> a few years ago had something to do with Indians and gaming; that would also be wrong. The *Oneida* case was simply the federal side of the federalist debate, stating, in effect, "we can never let a state break a federal law, even a 200 year old law about Indians." The *Seminole* case was the state side of the debate, stating, in effect, "even in an area like Indian affairs, where the federal government has 'plenary' power, we can't let it drag a sovereign state into a federal court." All the issues Indian nations face today—land claims, taxes, jurisdiction—are tied up with federalism. In planning political strategies and prosecuting cases to defend Indian sovereignty, Indian leaders must be careful of the implications of this great ongoing debate between non-Indian governments about their sovereignty.

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107. See generally, QUOTATIONS FROM SPEAKER NEWT: THE LITTLE RED, WHITE, AND BLUE BOOK OF THE REPUBLICAN REVOLUTION (Amy Bernstein & Peter Bernstein eds., 1995).

108. See *County of Oneida v. Oneida Nation of N.Y.*, 414 U.S. 661 (1974).

109. 517 U.S. 44 (1996).

